Thong Guan Co (Pte) Ltd v Lam Kong Co Ltd (No 2)

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–254 OF 1979
ABDUL MALIK ISHAK J
29 DECEMBER 1997

Land Law *— Sale of land — Whether contract in existence — Defendants deny having entered into sale and purchase agreement with plaintiffs — Whether sale and purchase agreement, if executed, was ultra vires defendants' memorandum and articles of association — Whether fraud upon defendants — Whether defence in nature of non est factum — Whether there was indeed a sale and purchase agreement between plaintiffs and defendants*

The plaintiffs had purchased 26 parcels of land in Johore Bahru from the defendants. The plaintiffs claimed that the defendants were required to apply to the Collector of Land Revenue for the issue documents of title for each of the 26 parcels of land and to execute the transfer documents in favour of the plaintiffs or their nominees, which the defendants had failed so to do. The plaintiffs obtained judgment in default of appearance against the defendants which, on appeal by the defendants, was set aside by the Supreme Court. Prior to this setting aside, the High Court of Johore Bahru had ordered the Registrar of Land Titles to issue the documents of title in favour of the plaintiffs. During the trial, the plaintiffs amended their statement of claim. The defendants proceeded to file a re-amended statement of defence denying the sale and purchase agreement and the receipt of the purchase monies. Alternatively, if the sale and purchase agreement was indeed executed, it was ultra vires the defendants' memorandum and articles of association and that it was a fraud on the defendants. The plaintiffs contended that the re-amended statement of defence of the defendants raised the defence of non est factum, which the defendants denied.

Held, allowing the plaintiffs' claim:

(1) The evidence of SP1 put an end to any speculation on the plea of non est factum whether it be in regard to the factual execution of the sale and purchase agreement or as to whether the defendants were misled or under any misconception as to the contents or nature of the document they were executing. The plea of non est factum was nothing more than being frivolous and vexatious. Seen in the perspective of the evidence of SP1 and the evidence as unfolded in its entirety, the defence of non est factum must fall flat on the ground (see p 730C–E).

(2) The defendants cannot blatantly deny receiving that sum in the face of the glaring evidence. The full sum had been paid and the defendants acknowledged receipt of the same. Clause 2 of the sale and purchase agreement clearly showed that the full purchase price had been disbursed even before the signing of exh P1 (see pp 732E–F, 733B).

(3) Article 78 of the defendants' articles of association provided that all acts done bona fide by the directors or by a committee of directors, or by any person as a director, shall be valid. By signing as a signatory to the sale and purchase agreement in exh P1, what the managing director did was entirely done above board and was valid. The seal of the defendants was affixed to the sale and purchase agreement as reflected in exh P1 and both the managing director and the secretary of the defendants had rightly put their signature thereto which must, in law, bind the defendants and be conclusive of the fact that the seal was properly affixed (see pp 739G–740A)

(4) The plea of fraud was wholly unsupported by the available evidence. Ironically, the plea of fraud emanated from the defendants when it should have been the plaintiffs who should take advantage of it (see p 751C).

[Bahasa Malaysia summary

Pihak plaintif telah membeli 26 lot tanah di Johor Bahru daripada pihak defendan. Pihak plaintif mendakwa bahawa pihak defendan dikehendaki memohon kepada Pemungut Hasil Tanah bagi mendapatkan dokumen-dokumen hakmilik keluaran bagi setiap 26 lot tanah tersebut dan untuk menyempurnakan dokumen-dokumen pemindahan hakmilik kepada pihak plaintif atau namaan-namaan mereka, di mana pihak defendan telah gagal berbuat sedemikian. Pihak plaintif telah mendapatkan suatu penghakiman keingkaran terhadap pihak defendan yang telah diketepikan oleh Mahkamah Agong setelah mendengar rayuan pihak defendan. Sebelum diketepikan, Mahkamah Tinggi Johor Bahru telah memerintahkan Pendaftar Hakmilik Tanah untuk mengeluarkan dokumen-dokumen hakmilik kepada pihak plaintif. Semasa perbicaraan, pihak plaintif telah meminda pernyataan tuntutan mereka. Defendan seterusnya memfailkan suatu pembelaan yang dipinda semula dan menafikan perjanjian jual beli tersebut dan penerimaan wang-wang pembelian tersebut. Secara alternatif, sekiranya perjanjian jual beli itu telah sebenarnya dilaksanakan, ia adalah di luar kuasa (ultra vires) memorandum dan perkara-perkara persatuan tersebut dan bahawa ia adalah satu penipuan (fraud) yang dilakukan ke atas pihak defendan. Pihak plaintif menegaskan bahawa pembelaan pihak defendan yang dipinda semula telah menimbulkan pembelaan non est factum yang telah dinafikan oleh pihak defendan.

Diputuskan, membenarkan tuntutan pihak plaintif:

(1) Keterangan SP1 telah mengakhiri segala spekulasi mengenai hujahan non est factum sama ada berkaitan dengan penyempurnaan faktual perjanjian jual beli tersebut atau sama ada pihak defendan telah dikelirukan atau berada di bawah sebarang salah tanggap terhadap kandungan-kandungan atau

sifat dokumen yang mereka sempurnakan. Hujahan non est factum tersebut tidak lebih daripada sesuatu yang remeh dan menyusahkan. Dilihat dari perspektif keterangan SP1 dan keterangan secara keseluruhannya, pembelaan non est factum semestinya tidak berjaya (lihat ms 730C–E). A

(2) Pihak defendan tidak boleh secara terang menafikan penerimaan jumlah tersebut apabila dihadapkan dengan keterangan yang sungguh kukuh. Jumlah yang penuh telah dibayar dan pihak defendan telah mengakui penerimaannya. Fasal 2 perjanjian jual beli tersebut jelas menunjukkan bahawa harga pembelian sepenuhnya telah dibayar sebelum ekshibit 1 ditandatangani (lihat ms 732E–F, 733B). B C

(3) Perkara 78 di dalam perkara-perkara persatuan pihak defendan menyatakan bahawa semua tindakan-tindakan yang dibuat secara suci hati oleh pengarah-pengarah atau jawatankuasa pengarah-pengarah atau dibuat oleh sesiapa sebagai seorang pengarah akan menjadi sah. Dengan menandatangani sebagai seorang penandatangan ke atas perjanjian jual beli di dalam ekshibit P1, apa yang dilakukan oleh pengarah pengerusi telah dilakukan secara benar sepenuhnya dan adalah sah. Meterai pihak defendan telah dilekatkan kepada perjanjian jual-beli sebagaimana ditunjukkan di dalam ekshibit P1 dan kedua-dua pengarah pengerusi dan setiausaha pihak defendan telah dengan betul menandatanganinya di mana di bawah undang-undang, ini mengikat pihak defendan dan menjadi bukti muktamad bahawa meterai itu telah dilekatkan dengan betul (lihat ms 739G–740A). D E

(4) Hujahan penipuan telah tidak disokong oleh sebarang keterangan yang ada. Sebenarnya, hujahan penipuan yang ditimbulkan oleh pihak defendan sepatutnya diambil peluang oleh pihak plaintif (lihat ms 751C).] F

Notes

For a case on the existence of a contract of a sale of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 2817. G

Cases referred to

Aga Khan v Times Publishing Co [1924] 1 KB 675 (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd) H

Baker v Dewey (1823) 1 B & C 704 (refd)

Bargate v Shortridge (1855) 5 HL Cas 297 (refd)

Barnet, Hoares & Co v The South London Tramways Co (1887) 18 QBD 815 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd) I

Bowman v Taylor (1834) 4 LJKB 58 (refd)

British Provident, Life & Assurance Society, Re, Grady's Case (1863) 1 De GJ & Sm 488 (refd)
Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd [1947] AC 46 (refd)
Channel Collieries Trust Ltd v Dover, St Margaret's and Martin Mill Light Rly Co [1914] 2 Ch 506 (refd)
County Life Assurance Co, Re (1870) 5 Ch App 288 (refd)
County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co [1895] 1 Ch 629 (refd)
Crabb v Arun District Council [1976] Ch 179 (refd)
Currie v Misa (1875) LR 10 Ex 153 (refd)
District Bank Ltd v Webb [1958] 1 All ER 126; [1958] 1 WLR 148 (refd)
Duck v Tower Galvanizing Co Ltd [1901] 2 KB 314 (refd)
Duke v Wisden (1897) 77 LT 67 (refd)
Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847 (refd)
Elkington v London Association for the Protection of Trade (1911) 27 TLR 329 (refd)
Gallie v Lee & Anor [1969] 1 All ER 1062 (refd)
Howard v Patent Ivory Manufacturing Co (1888) 38 Ch D 156 (refd)
Kanssen v Rialto (West End) Ltd & Ors [1944] Ch 346; [1944] 1 All ER 751 (refd)
Kredit Bank Cassel GmbH v Schenkers Ltd & Ors [1927] All ER Rep 421 (refd)
Lam Kong Co Ltd v Thong Guan Co (Pte) Ltd [1985] 2 MLJ 429 (refd)
Lloyd (Pauper) v Grace, Smith & Co [1912] AC 716 (refd)
Lee Cheong Fah v Soo Man Yoke [1996] 2 MLJ 627 (refd)
Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor [1976] 2 MLJ 177 (refd)
Mahony (Public Officer of National Bank of Ireland) v East Holyford Mining Co Ltd [1874–80] All ER Rep 427 (refd)
Milbank v Milbank [1900] 1 Ch 376 (refd)
Mills v Cooper [1967] 2 QB 459 (refd)
Morris v Kanssen & Ors [1946] AC 459; [1946] 1 All ER 586 (refd)
Mountford & Anor v Scott [1975] 1 All ER 198 (refd)
Ooi Yoke In & Anor v Public Finance Bhd [1993] 2 CLJ 464 (refd)
Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors [1998] 1 MLJ 465 (refd)
Philipps v Philipps (1878) 4 QBD 127 (refd)
Potts v Nixon (1870) IR 5 CL 45 (refd)
Robinson's Settlement, Re; Gant v Hobbs [1912] 1 Ch 717 (refd)
Royal British Bank v Turquand (1856) 119 ER 886 (refd)
Saunders v Jones (1877) 7 Ch D 435 (refd)
Saunders (Executrix of the estate of Rose Maud Gallie (deceased) v Anglia Building Society (formerly Northampton Town and Country Building Society) [1970] 3 All ER 961 (refd)
Spedding v Fitzpatrick (1888) 38 Ch D 410 (refd)

Legislation referred to

Evidence Act 1950 s 115

M Pathmanathan (*Gan Techiong* with him) (*Gan & Lim*) for the plaintiffs.
Romesh Abraham (*Sunita S Sothi* with him) (*Brockett & Cho*) for the defendants.

Abdul Malik Ishak J: This was an old case. It had a chequered history. Both the plaintiffs and the defendants are bodies corporate registered in the Republic of Singapore. Walter CM Woon in his book entitled *Company Law* at p 47, described a company in this way:

> A company is in law a person. But a company has no body to be kicked and no soul to be damned, no hands with which to work and no mind with which to think. It cannot act by itself. It must work through the medium of some human being. The question is, which humans represent that entity called 'the company'? A distinction must be made between human beings who are, for certain purposes, considered to be the company and those who are merely agents who act on behalf of the company.
>
> Every company has two organs: the members collectively and the board of directors. The members of the company express their decisions through resolutions passed in general meetings of the company. Similarly, decisions of the board of directors are reflected in the resolutions of the board. Either of these organs can be the company. The memorandum or articles of association of the company will divide powers of the company between the general meeting and the board, and will define their respective functions.

At p 49 of the book, the learned author wrote:

> Whenever there is a delegation of responsibility or power to an agent, that agent is given some sort of authority by the principal. This authority is the actual authority of the agent; it may be express or it may be implied. Express authority is that which is expressly conferred upon the agent. Implied authority is not expressly stated; it is authority implied by the circumstances. This may be of two forms: authority to do things incidental to matters that the agent is expressly authorized to do (*Pole v Leask* (1860) 28 Beav 562 at p 575, per Sir John Romilly MR, which was affirmed by the House of Lords as reported in (1863) 33 LJ Ch 155), and authority to do things that a person in such a position usually does (*Hely-Hutchinson v Brayhead Ltd* [1968] 1 QB 549 at p 583 — where the appointment of a person as the managing director of a company impliedly authorizes him to do all such things as fall within the usual scope of that office, per Lord Denning MR).

The plaintiffs, Thong Guan Co (Pte) Ltd, purchased 26 parcels of land in the Mukim of Tebrau, in the district of Johor Bahru from the defendants, Lam Kong Co Ltd, by way of an agreement in writing dated 28 July 1967 — some 30 years ago. The total consideration for the sale and purchase of that 26 parcels of land was S$52,000, and by cl 2 of the sale and purchase agreement, that sum had been acknowledged by the defendants who were the vendors as having been paid by the plaintiffs before the execution of the sale and purchase agreement.

In the course of the trial, the sale and purchase agreement was marked as exh P1.

A The plaintiffs agreed, pursuant to the sale and purchase agreement, to erect on each of the said 26 lots, a building in accordance with the plans already submitted by the defendants' architects and approved by the Collector of Land Revenue. It is germane to reproduce cl 10(b) of the sale and purchase agreement which was worded thus:

B > The vendor further agrees to allow the purchaser and/or its assigns to make use of its building plans as drawn by the vendor's architect and the purchaser shall not be liable for the payment of any architect fees, previously incurred by the vendor.

The statement of claim further deposed that the defendants were then C required to apply to the Collector of Land Revenue Johor Bahru for the issue documents of title to each of the 26 parcels of land and to execute the transfer documents in favour of the plaintiffs or their nominees. It was alleged that the defendants failed, refused and/or neglected to fulfill their contractual obligations and this prompted the plaintiffs to institute the present proceedings on 4 August 1979, seeking, inter alia, the following D reliefs:

(a) that the defendants deliver to the plaintiffs all the issue documents of title to the 26 parcels of land;

(b) that the defendants do execute and deliver 26 valid and registrable transfers of the 26 parcels of land in favour of the plaintiffs;

E (c) all other consequential orders and directions;

(d) damages arising from the delay in the defendants to fulfill their obligations under the sale and purchase agreement;

(e) further or other relief; and

F (f) costs.

Interestingly, on 14 January 1980, the plaintiffs obtained judgment in default of appearance against the defendants. Being aggrieved, the defendants lodged an appeal, and the then Supreme Court set aside that judgment in default of appearance. The judgment of the then Supreme Court has since been reported: *Lam Kong Co Ltd v Thong Guan Co (Pte) Ltd* [1985] 2 MLJ 429. G However, prior to the then Supreme Court setting aside the judgment in default of appearance, the High Court of Johor Bahru had, on 22 March 1982 ordered, inter alia, the senior assistant registrar to execute the transfers of the 26 parcels of land in favour of the plaintiffs and the Pendaftar Hakmilik Tanah Johor Bahru was ordered to enter a memorial on each of the register H and to issue the documents of title in favour of the plaintiffs. His Lordship Abdul Hamid Omar CJ (who later rose to be the Lord President of the then Supreme Court) writing for the then Supreme Court in *Lam Kong Co Ltd v Thong Guan Co (Pte) Ltd*, adverted to the transfers of the 26 parcels of land in favour of the plaintiffs in this way (at p 431):

I > Finally, we refer to the respondents' contention that since the order had been perfected, it was therefore too late to set aside the default judgment. Counsel pointed out that the land had been transferred to the respondents and registered.

On 4 February 1987, the defendants obtained an order before Mohd Yusoff Mohamed J (who later rose as SCJ) against the plaintiffs to post security for costs in the sum of RM20,000. The plaintiffs successfully applied to set aside that order on 10 June 1991 before Abu Mansor J (now JCA). A

Undaunted, the defendants further applied to strike out the present proceedings for want of prosecution and failed miserably before the senior assistant registrar on 10 November 1992. Pending an appeal to the judge-in-chambers, the defendants applied and obtained an order for a stay of proceedings on 9 February 1993. Unfortunately, the defendants' appeal to the judge-in-chambers was summarily dismissed with costs on 13 August 1994. B

It must be recalled that pursuant to the order of the court dated 22 March 1982, the Collector of Land Revenue had issued 26 titles in favour of the plaintiffs. Somehow, one of the titles was wrongly issued to the plaintiffs for Lot 2605, when it should have been for Lot 2505. In due course, Lot 2605 was transferred to the rightful owner leaving the plaintiffs with 25 lots registered in their favour. C

Now, after the then Supreme Court had set aside the judgment in default of appearance, the defendants discovered that the old issue documents of title, as seen at pp 59–82 of bundle 'A', which were issued to them on 29 May 1968, had been cancelled by the Collector of Land Revenue at the time of the issuance of new documents of title to the plaintiffs on 28 October 1984, as reflected at pp 11–58 of bundle 'A'. The defendants took the necessary steps to convince the Collector of Land Revenue to make the necessary endorsements on the register documents of title of the new titles to indicate that the default judgment had been set aside and that the defendants were the proprietors of the land in question. The Collector of Land Revenue ignored the defendants' request and the plaintiffs continued to have possession of the new issue documents of title which clearly showed that the plaintiffs remained as the proprietors of the land in question. D E F

In the midst of the trial, while the plaintiffs' first witness was in the witness box, the plaintiffs successfully applied and obtained an order on 4 January 1997, to amend the statement of claim seeking, inter alia, the following reliefs: G

(a) a declaration that the 25 issue documents of title issued in the plaintiffs favour on 28 October 1984 is valid;

(b) an order directing the Registrar of Titles Johor Bahru to endorse the plaintiffs as the registered proprietor on the register document of title;

(c) an order directing the defendants to deliver the 26 title, ie in respect of Lot 2505 to the plaintiffs together with the duly executed and registrable transfer documents in favour of the plaintiffs; H

(d) all other consequential orders and directions; and

(e) an order that damages be assessed. I

Surprisingly, the defendants have not appealed against the order dated 4 January 1997, and, instead, proceeded to file and serve a re-amended

statement of defence. A judgment was written and circulated to all parties in regard to the order dated 4 January 1997, but unfortunately the judgment was not reported. I did say in that judgment the following:

> At the end of the day, it is appropriate that this court thread cautiously and consider the materiality and effectiveness of the proposed amendments. It would be a good working practice not to allow an amendment where such an amendment would be useless. Put bluntly, the amendment must be effectual. If it is ineffectual, then the amendment ought not to be allowed (*Ponnusamy v Nathu Ram* [1959] MLJ 228). Having perused through the proposed amendments at some length, it is my judgment that the amendments as proposed and highlighted by Mr M Pathmanathan, would certainly bring into sharp focus the whole perspective of the case. It was an effectual and a useful amendment. The proposed amendments were necessary to align the pleadings with the evidence thus far adduced.

At p 76 of the notes of evidence, there was a note to indicate that, by consent, the parties agreed to address the court on the issue of liability in regard to the present proceedings and that the issue of damages would be assessed by the senior assistant registrar. Indeed this concession was a time saving device advanced by both parties. A move that should be applauded.

The defence

The re-amended statement of defence as seen at bundle 'D' raised in clear language the following defences:

(1) The defendants denied entering into the sale and purchase agreement dated 28 July 1967 (exh P1), and averred that there was no sale of the 26 lots of land (see para 1 of the re-amended statement of defence). This defence was in the nature of the classical defence of non est factum.

(2) The defendants denied receiving the purchase money of S$52,000 in regard to the alleged sale (see para 1 of the re-amended statement of defence).

(3) Alternatively:

(a) the defendants contended that if the sale and purchase agreement did exist, it was ultra vires, the defendants Memorandum and articles of association and was therefore void (see para 2.1 of the re-amended statement of defence).

(b) the defendants contended that the plaintiffs were not entitled to the reliefs as prayed for in the writ and the amended statement of claim because the plaintiffs have failed to conduct the works referred to in the sale and purchase agreement and further the plaintiffs have failed to pay the outgoings (see para 2.2, I and II of the re-amended statement of defence).

(4) The defendants alleged that the sale and purchase agreement was a fraud on the defendants in which the plaintiffs knowingly assisted and that the plaintiffs were estopped from taking advantage of that fraud. The particulars of fraud were itemized as follows:

(i) that the plaintiffs knew or ought to have known that the purported signatories of the alleged agreement did not have the authority, apparent or otherwise, to execute the alleged agreement on behalf of the defendants;

(ii) that the plaintiffs failed to forward a copy of the alleged agreement to the defendants and/ or failed to put the defendants on notice of the existence of the alleged agreement at/or about the material time. (see para 2.3, (i) and (ii) of the re-amended statement of defence). A

(5) The plaintiffs claim was time barred (see para 6 of the re-amended statement of defence).

B

The defence of non est factum

Mr M Pathmanathan, assisted by Mr Gan Techiong, argued the case for the plaintiffs and they submitted that there was a defence of this nature. Mr Romesh Abraham and Madam Sunita S Sothi for the defendants, held a contrary view and argued that the defence under this head was misconceived and misconstrued as it had not been raised by the defendants. C

The defendants argued that the denial by the defendants in entering into the agreement dated 28 July 1967, and that there was no sale of the 26 lots of land, should be read in the context of the challenge to the validity of the agreement and the authority of the signatories purportedly signing on behalf of the defendants. The defendants further argued that they found it difficult to fathom as to how and where the plea of non est factum arose and that whatever submissions that were made under this head were said to be made solely to side track and detract from the main issues. D

The plaintiffs took a cudgel and argued that the re-amended statement of defence raised the defence of non est factum in its true and original form as defined in *Gallie v Lee & Anor* [1969] 1 All ER 1062. The challenge as to the authority of the defendants' signatories was an alternative defence and that on the plain reading of the pleadings, although the terminology of the words 'non est factum' was not employed, yet the language couched in the manner as portrayed in para 1 of the re-amended statement of defence showed this trend of thinking. E F

It is useful to quote in verbatim para 1 of the re-amended statement of defence which reads as follows:

> Paragraphs 1 and 2 of the statement of claim are denied. The defendants deny entering into the agreement, dated 28 July 1967, for the sale of 26 lots of land. The defendants aver that there was and still is, no such sale. Accordingly, the defendants deny receiving the sum of S$52,000 or any sum at all for the alleged sale. G

One of the cardinal principles of pleading is to tell his opponent what he is coming to court to prove (*Re Robinson's Settlement; Gant v Hobbs* [1912] 1 Ch 717 at p 728). The various defences must be clearly and distinctly pleaded and the facts upon which each is grounded should be stated separately. The defendants here must make it quite clear what line of defence they are adopting. Here, the plaintiffs pleaded that there was a contract made and, consequently, it will be idle for the defendants to merely traverse (deny) the making of the contract. Of course, the defendants here were entitled to raise collateral matters in their defence. In my judgment, when the defendants put up the defence as seen in para 1 of the re-amended statement of defence, they were in fact raising up the defence of non est H I

A factum. Even though that line of defence was not happily worded, yet it conveyed that message. The function of pleadings may compendiously be stated in these terms.

(1) To inform the other side of the nature of the case that they have to meet as distinguished from the mode in which that case is to be proved B (*Duke v Wisden* (1897) 77 LT 67 at p 68; *Aga Khan v Times Publishing Co* [1924] 1 KB 675 at p 679).

(2) To prevent the other side from being taken by surprise at the trial proper (*Spedding v Fitzpatrick* (1888) 38 Ch D 410).

(3) To enable the opponent to know what evidence they ought to be C prepared with and to prepare for the trial proper (*Elkington v London Association for the Protection of Trade* (1911) 27 TLR 329 at p 330).

(4) To limit and curtail the generality of the pleadings (*Saunders v Jones* (1877) 7 Ch D 435).

(5) To pinpoint and define the issues to be tried, and this, in turn, enables D discovery to be done (*Milbank v Milbank* [1900] 1 Ch 376 at p 385).

(6) To prevent the parties from going astray, unless leave was given (*Philipps v Philipps* (1878) 4 QBD 127 at p 133).

I must say at once that the defence of non est factum goes against the grain of the evidence. There is an overwhelming and compelling evidence to show E that the sale and purchase agreement, dated 28 July 1967, was in fact executed by the parties. At p 16 of the notes of evidence, there was evidence emanating from Mr Hsieh Shao-An @ Cheah Siew Onn (SP1 — 'Mr Hsieh'), a seasoned advocate and solicitor from Singapore, to the effect that the parties had appointed Messrs Boswell, Hsieh & Lim as their common solicitors to prepare the necessary legal documentation. The F partners of that law firm at the material time, were Mr Boswell and Mr Hsieh — the former qualified from Cambridge University just like Tan Sri Ahmad Ibrahim (see p 26 of the notes of evidence), while the latter is a product of Oxford (see p 40 of the notes of evidence). Mr Hsieh was quite categorical when he said that it was not the case of a one off transaction but G rather 'my law firm acted for Lam Kong Estate Johor Bahru for a number of years, throughout' (see p 17 at the top portion of the notes of evidence). Of pertinence was Mr Hsieh's testimony to the effect that 'at the time when the parties executed the agreement, the parties knew the nature of the transaction which they executed' (see p 17 of the notes of evidence). Earlier on in his evidence, Mr Hsieh testified: 'I witnessed the signing of this H agreement by all the parties .... I witnessed the signing of this document by both the vendor and the purchaser' (as seen at p 7 of the notes of evidence). It must be emphasized that the sale and purchase agreement was drawn up by Mr Boswell and prepared by the law firm of Messrs Boswell, Hsieh & Lim in Singapore (see p 10 of the notes of evidence). Mr Hsieh too knew all the signatories to the sale and purchase agreement very well and that I both parties frequented his office, and that the parties executed the sale and purchase agreement knowing fully well the nature of the transaction which they executed as evidenced from pp 17 and 27 of the notes of evidence.

Under cross-examination, Mr Hsieh remained firm and stood to his ground. Mr Hsieh was asked this question, as seen at p 21 of the notes of evidence, and he gave a categorical reply:

> Question: Do you agree that the purpose of your signatures on this document is to attest the signatures of the others appearing therein?
>
> Answer: Yes, I attested their signatures when they came before me.
>
> I agree that to attest meant that I saw the persons who signed in my presence, who signed before me.

Mr Hsieh too testified that the managing director of the defendants, one Thong Kong Fye, confirmed having received the purchase price. Mr Hsieh gave forthright evidence and it was his testimony that as a practising solicitor, he adopted a salutary practice of explaining a document to the parties, particularly to those who do not read English or who are not English educated, as was the case of Thong Kong Fye (see p 28 of the notes of evidence). In my judgment, the evidence of Mr Hsieh put an end, once and for all, any speculation on the plea of non est factum whether it be in regard to the factual execution of the sale and purchase agreement or as to whether the defendants were misled or under any misconception as to the contents or nature of the document they were executing. It must be emphasized that the original of the sale and purchase agreement was produced, but without its appendix which by all accounts were not material nor critical. In my judgment, the plea of non est factum was nothing more than being frivolous and vexatious. Seen in the perspective of the evidence of Mr Hsieh and the evidence as unfolded in its entirety, the defence of non est factum must fall flat to the ground. Another factor to consider would be this. The correspondences that transpired between the parties following the execution of the sale and purchase agreement — were in the nature of contemporaneous documents, the originals of which were written by the defendants' themselves, and these documents proved on the balance of probabilities that not only was the sale and purchase agreement executed, but the defendants and its new board and shareholders affirmed the same and repeatedly, in no uncertain terms, held themselves bound by it and assured the plaintiffs that they would honour the terms of the sale and purchase agreement.

Lord Hodson in *Saunders (Executrix of the State of Rose Maud Gallie (deceased) v Anglia Building Society (formerly Northampton Town and Country Building Society)* [1970] 3 All ER 961, had this to say of the plea of non est factum as seen at pp 965–966 of the report:

> The plea of non est factum requires clear and positive evidence before it can be established. As Donovan LJ said, delivering the judgment of the Court of Appeal in *Muskham Finance Ltd v Howard* [1963] 1 All ER 81 at p 83, [1963] 1 QB 904 at p 912: 'The plea of non est factum is a plea which must necessarily be kept within narrow limits.' To take an example, the man who in the course of his business signs a pile of documents without checking them, takes the responsibility for them by appending his signature. It would be surprising if he was allowed to repudiate one of those documents on the ground of non est factum.

The House of Lords in *Saunders v Anglia Building Society*, held that although until the 16th century, the plea of non est factum was limited to instances of not in fact signing the document, it had since been extended to blind and illterate persons and within very limited exceptions, to cases where a person who in fact signed a document says that it is not his deed.

Lord Denning MR in *Gallie v Lee & Anor*, after going through a long discussion said at p 1072 of the report:

> Whenever a man of full age and understanding, who can read and write, signs a legal document which is put before him for signature — by which I mean a document which, it is apparent on the face of it, is intended to have legal consequences — then, if he does not take the trouble to read it but signs it as it is, relying on the word of another as to its character or contents or effect, he cannot be heard to say that it is not his document. By his conduct in signing it, he has represented, to all those into whose hands it may come, that it is his document; and once they act on it as being his document, he cannot go back on it and say that it was a nullity from the beginning. If his signature was obtained by fraud, or under the influence of mistake, or something of the kind, he may be able to avoid it up to a point — but not when it has come into the hands of one who has in all innocence, advanced money on the faith of its being his document, or otherwise has relied on it as being his document.

Salmon LJ in *Gallie v Lee & Anor*, was quite bold when his Lordship remarked at p 1078 of the report that the defence of non est factum 'as developed in the nineteenth century has become a dangerous anachronism in modern times ...'.

Back home in Malaysia, I refused to put the plea of non est factum in motion in the case of *Lee Cheong Fah v Soo Man Yoke* [1996] 2 MLJ 627, and this was what I had said at p 635 of the report:

> It is my judgment that even if the plea of non est factum had been raised in the pleading, that plea will not be put in motion for the defendant. The reason is fairly simple. Apart from her initials that appeared in every page of exh P2, her own signature appeared prominently at the last page of exh P2 and that is sufficient to seal the fate of the defendant. Another reason would be this. There was evidence that the defendant was a businesswoman of some standing in society. She used to be a dealer in furniture, and once upon a time, was a hairdresser and a seamstress in that order. Surely a woman of her standing in society cannot be said to be illiterate.

By comparison and on the other end of the scale, the defendants here are many rungs further up the ladder in society. An upper echelon. They are an established large foreign company owning vast tracts of land in Johore and habitually entered into real property transactions. From the evidence, it was clear that the law firm of Messrs Boswell, Hsieh & Lim were the defendants regular firm of solicitors and it was hardly plausible and indeed incomprehensible that they would have failed to protect their clients' interests.

Again in *Ooi Yoke In & Anor v Public Finance Bhd* [1993] 2 CLJ 464, especially at pp 469–470 of the report, I said:

> In short, when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, the party signing it is bound, and it is wholly immaterial:
>
> (1) whether he has read the document or not; and
>
> (2) whether he knows no English and the contents were not explained to him.

Turning momentarily to the issue of fraud which was pleaded by the defendants, it must be emphasized that the fraud that was suggested was fraud that emanated from the defendants own officers and not that of the plaintiffs.

In my judgment, the defence of non est factum has no place in the present proceedings. All the facts point against it and I so hold accordingly. The defendants miserably fail to discharge the burden when they sought to disown the sale and purchase agreement dated 28 July 1967. As Lord Reid said in *Saunders v Anglia Building Society*, at p 963 of the report:

> ... So there must be a heavy burden of proof on the person who seeks to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances.

Failure of consideration in regard to S$52,000

The defendants pleaded and denied receipt of S$52,000, in regard to the sale of the 26 lots of land. The sale and purchase agreement clearly sets out the total consideration as S$52,000, calculated on the basis of S$2,000 per lot. It is necessary to mention that by cl 2 of the sale and purchase agreement dated 28 July 1967, the defendants have expressly admitted receiving this sum, being the whole of the purchase price prior to the execution of the agreement. Since I have held in the context of the plea of non est factum that the sale and purchase agreement was indeed signed by both parties, and it could not be avoided, it follows, as the night the day, that the defendants had received the whole of the purchase price. Evidence wise, Mr Hsieh testified, under re-examination as reflected at p 38 of the notes of evidence, to the following effect:

> Page 158 of bundle 'A' at cls 1 and 2, I explained to Thong Kong Fye and he admitted to me that Kam (Lam) Kong Co had been paid S$52,000. I was satisfied and I have to be satisfied to that effect and if Thong Kong Fye said that Lam Kong Co had been paid S$52,000, I have no more questions to ask of him.

Mr Hsieh emphatically stated at p 39 of the notes of evidence:

> As far as my memory serves me as far as I am concerned, all the evidence I gave in this court is correct and true. There is no reason at all for me to lie.

Mr Ng Ek Teng (SP2), the corporate secretary of the plaintiffs' company, testified at p 125 of the notes of evidence to the following effect:

> At p 150 of bundle 'A', I confirmed the purchase price to be S$52,000 and I confirmed payment thereof. At p 192 of bundle 'F' under Addition (b) it is shown the sum of S$52,000.

Now, p 192 of bundle 'F' is the 1967 accounts of Thong Guan Co Ltd — Singapore (exh P28) and under category of 'Additions — At Cost', at para (b), it was worded thus:

> Land at Jalan Pandan, Johor Bahru. $52,000.

What did the defendants do to challenge the payment of S$52,000? They did nothing, and they were content to merely make a bare allegation unsupported by concrete evidence. In my judgment, the defendants cannot blatantly deny receiving that sum in the face of the glaring evidence.

In *Chappell & Co Ltd & Anor v Nestle Co Ltd & Anor* [1960] AC 87, the House of Lords held that chocolate wrappers formed part of the consideration though the wrappers were of little value and were thrown away by the manufacturers. Nominal consideration in option agreements may constitute valid consideration as illustrated in *Mountford & Anor v Scott* [1975] 1 All ER 198, and the Malaysian case of *Macon Works & Trading Sdn Bhd v Phang Hon Chin & Anor* [1976] 2 MLJ 177. In the present case, it was not suggested nor pleaded that the sum of S$52,000 was an inadequate consideration. There was nothing to show that the sum of S$52,000 was not a valid and good consideration that flowed from the plaintiffs to the defendants in regard to the sale of the 26 lots of land.

Consideration is said to be a detriment to the promisee and likewise it may be a benefit to the promisor. Lush J in *Currie v Misa* (1875) LR 10 Ex 153 at p 162 observed:

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other ... .

Consideration is also defined as the price requested by the promisor, in exchange for which the promisor's promise was bought. Lord Dunedin puts it neatly in *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847 at p 855:

> An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

It is a correct statement of the law to say that if what is given in exchange for the promise has value in the eyes of the law, the court will not question whether that value is adequate and will not interfere with the fairness of the bargain made by the parties. This was exactly what transpired in the present case. The sum of S$52,000, in the eyes of the law, was an adequate consideration which should be given effect to. This was my judgment and I so hold accordingly.

In a surprise move, the defendants did not address this issue but merely put the plaintiffs to strict proof at the trial of the payment of the purchase price. Except to refer to the recent decision of the Federal Court in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors* [1998] 1 MLJ 465, which disapproved the dicta of the Court of Appeal in *Aik Ming (M) Sdn*

Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, that the payment of the purchase price, either in full or otherwise, was a relevant consideration to the question of a bona fide purchaser — no other submission was made on this issue. The Federal Court in *Pekan Nenas*, speaking through Edgar Joseph Jr FCJ held that:

> When, as here, the question arises whether a person dealing with a company has contracted in good faith, there is no qualification on the definition of purchaser, all that is necessary is that he should have contracted in good faith and have given value. In our view, for this purpose, the common law definition of who is a bona fide purchaser is applicable and, for this, we would refer to *Hunt v Fripp* (1898) 1 Ch D 675, cited to us during the argument, where Byrne J said this (at p 682):
>
> > 'I do not, therefore, except so far as it affects the conduct of the plaintiffs, propose to consider whether Emery was dealing fairly or otherwise, or whether he left undone what he ought to have done. It has been put to me, and I think not unfairly, that saying "dealing bona fide" is equivalent to saying "dealing honestly", and that what I really have to consider is, were the plaintiffs behaving honestly when they took the assignment in question from Emery?'
>
> The above observation of Byrne J was approved by Bingham J in *Re Bennett, ex p The Official Receiver* [1907] 1 KB 149:
>
> > 'In our view, therefore, when, as here, there is a dispute between the immediate parties to a sale and purchase transaction, a bona fide purchaser is not necessarily one who has paid the full purchase price. Much will depend upon the particular circumstances of each case.'

Here, the full purchase price had been paid and the defendants acknowledged receipt of the same. Clause 2 of the sale and purchase agreement (exh P1 in bundle 'A'), clearly showed that the full purchase price had been disbursed even before the signing of exh P1. This is the particular circumstance of this case that should be brought to the fore — a point that was emphasized by his Lordship Edgar Joseph Jr FCJ in *Pekan Nenas*.

The ultra vires issue

This is an interesting issue. This formed an alternative defence and that defence was this: If the sale and purchase agreement was indeed executed, then it would not be valid and binding on the defendants, by reason of the fact that there being no evidence that Thong Kong Fye, the managing director of the defendants, and Koh Kok Peng, the secretary of the defendants, were duly authorized to execute the sale and purchase agreement on the defendants' behalf.

Speaking generally, the cardinal principle of law distilled from *Turquand*'s case (*Royal British Bank v Turquand* (1856) 119 ER 886), would simply mean that third parties having bona fide dealing with officers of a company, having apparent or ostensible authority, are under no duty to conduct an investigation as to the capacity or power of the company officers and are not required to inquire into the internal affairs of the company. Put

differently, an outsider dealing with a company is entitled to assume that all matters of internal management and procedure have been complied with. The rule in the *Turquand*'s case is aimed at internal matters, proceedings and affairs of the company which are not within the knowledge of the outsider who can then assume that they have been complied with in full.

A lucid exposition of the law can be found in Palmer's *Company Law* (24th Ed) at p 247, where the learned author said:

> According to this rule, while persons dealing with a company are assumed to have read the public documents of a company and to have ascertained that the proposed transaction is not inconsistent therewith, they are not required to do more; they need not inquire into the regularity of the internal proceedings.

Lord Hatherley in *Mahony (Public Officer of National Bank of Ireland) v East Holyford Mining Co Ltd* [1874–80] All ER Rep 427 at p 432 of the report described it as 'the indoor management' and an outsider may assume that all is being done regularly (*omnia praesumuntur rite et solemniter esse acta*).

The learned author then proceeded to examine the necessity and justification for such a practical rule in the following salient words:

> This rule, which is based on a general presumption of law, is eminently practical, for business could not be carried on if a person dealing with the apparent agents of a company are compelled to call for evidence that all internal regulations had been duly observed. Thus, where the articles gave power to borrow with the sanction of an ordinary resolution of the general meeting, a lender who relies on this power need not inquire whether such sanction has in fact been obtained. He may assume that it has, and if he is acting bona fide, he will, even though the sanction has not been obtained, stand in as good a position as if it had been obtained.

In the same vein, Atkin LJ said in *Kredit Bank Cassel GmbH v Schenkers Ltd & Ors* [1927] All ER Rep 421, especially at p 430 of the report:

> ... If you are dealing with a director in a matter in which a director normally would have power to act for the company, you are not obliged to inquire whether or not the formalities required by the articles before he exercises that power have in fact been complied with. Those are matters of internal management — which an outsider is not obliged to investigate.

Article 3(2) of the defendants Memorandum of Association as seen at p 86 of bundle 'A' stipulates in no uncertain terms the defendants' right:

> To purchase or otherwise howsoever acquire for investment or resale, and to traffic in land and house and other property or of any tenure and any interest therein and to create, sell, and to make advances upon the security of land or house or other property or any interest therein by way of mortgage or otherwise, and generally to deal in, traffic by way of sale, lease, exchange or otherwise with the land and house property and any other property whether real or personal whether for valuable consideration or not.

Flowing from the recital of art 3(2) of the defendants Memorandum of Association, one can safely say that the defendants are empowered to transact in land and I must say that it was wholly immaterial whether the internal management was not followed. Indeed from the authorities, it can

reasonably be presumed that the internal management was dutifully followed for the simple reason that the transaction was conducted by their very own regular solicitors. As the trial progressed, the defendants took the easy way out. They blamed that they were not in possession of all the documents as the documents were said to be destroyed by the 1972 fire.

The rule in *Turquand*'s case was microscopically examined by the eminent judge, his Lordship Edgar Joseph Jr FCJ, in the now celebrated case of *Pekan Nenas*. I will now proceed to cite passages of that decision and make the necessary comments, where appropriate, to the factual matrix of the present case. His Lordship Edgar Joseph Jr FCJ, succinctly said in *Pekan Nenas* (at p 507):

(a) The rule in *Turquand*'s case cannot however, be invoked by an outsider who knows or ought to know that there is an irregularity.

(b) More particularily, outsiders dealing with a company who know that some relevant procedure internal to the company has not been followed cannot invoke the benefit of the indoor management rule (see *Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch D 156). This is an exception to the rule in *Turquand*'s case and the burden of establishing it lies on the party invoking the exception and in this case that would be the father and his faction.

Now, the defendants in the present case contended that the factual matrix was an exception to the rule in *Turquand*'s case and naturally the burden was on them. Unfortunately, the defendants failed to establish any lack of bona fides or knowledge of any irregularity on the plaintiffs' part.

(c) Furthermore, outsiders dealing with a company could also be affected by knowledge of facts which would put a reasonable person on inquiry, in other words, they would be deemed to know what a reasonable person would infer from known facts. So, for example, in *B Liggett (Liverpool) Ltd v Barclays Bank Ltd* [1928] 1 KB 48 at p 56, Wright J (as he then was) said:

> 'Whatever may be the exact scope of the rule in *Turquand*'s case, I think it is quite clear on principle and on the authorities I have already referred to, that it can never be relied upon by a person who is put on inquiry. The rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the prima facie presumption, then it is clear, I think, that he cannot claim the benefit of the rule ... .'

The available evidence showed that the plaintiffs had no knowledge that anything was amiss or for that matter, that there were facts that would have put them on inquiry.

(d) And, in *Morris v Kanssen & Ors* [1946] AC 459, Lord Simonds made it clear that an outsider cannot invoke the benefit of the Turquand rule if he is put upon inquiry. Here is what his Lordship said on this point (at p 475):

> 'He cannot presume in his own favour that things are rightly done if inquiry that he ought to have made would tell him that they were wrongly done.'

(e) So also, an outsider dealing with a company cannot invoke the benefit of the Turquand rule if he could or should, in the circumstances, have discovered the defect by inspecting the compulsory documents filed at the Registry of Companies, which are open to public inspection (see *Irvine v Union Bank of Australia* (1877) 2 App Cas 366).

It is interesting to note, documentary wise, that from the defendants' own document that was lodged by way of Form 31 with the Singapore's Registry of Companies — it showed the resignations of Kwek Kok Thye and Kang Koh Ee on 27 July 1967. Form 31 was dated 21 August 1967 (see p 140 of bundle 'A'). Now, if the plaintiffs were to inspect and undertake a search on 28 July 1967 (the date of the sale and purchase agreement), everything would appear to be in order. Since the burden of proving the exception to the Turquand's rule being squarely put on the shoulders of the defendants, the defendants had failed to adduce any concrete evidence from the Singapore's Registry of Companies to show that, on 28 July 1967, Koh Kok Peng was no longer the secretary of the defendants. If at all these are internal matters peculiarly known to the defendants.

(f) The material time at which there must be knowledge or the means of knowledge is the time of entry into the transaction (see *Kanssen v Rialto (West End) Ltd* [1944] Ch 346; *Morris v Kanssen* [1946] AC 459).

'The time of entry into the transaction' in the present case was on 28 July 1967, and on that material date the records of the Registry of Companies at Singapore would not have supported the defendants contention that this case was an exception to the rule in Turquand's case. Of pertinence to note would be this. Both the vendors and purchasers have one or two common directors; and that being the case, there was no reason to put a reasonable person on enquiry to ascertain whether the sale and purchase of the subject property was tainted with fraud. All along it was the defendants who were alleging fraud and they were the ones who were contending that the facts of this case fall within the exception to the rule in *Turquand*'s case and, consequently, the burden of proving that fall on them. The defendants conveniently overlooked their evidential burden and thus failed to adduce any evidence in that direction. There was no evidence emanating from the defendants to show that there was no resolution by the defendants board barring the defendants managing director and secretary to execute the sale and purchase agreement. The defendants were a contented lot and they were content to say through the testimony of a retired director in the person of Hii Yii Pan (SD1), that all the defendants records were lost or destroyed by fire. Giving the highest leverage to the evidence of Hii Yii Pan (SD1), at best it can be said that the defendants were not in a position to confirm nor deny any facts. The defendants were handicapped; they were in no position to discharge the burden entrusted on them. That being the case, the evidence of the common solicitor in the person of Mr Hsieh must necessarily hold water.

The rule in *Turquand*'s case certainly come in handy for the plaintiffs. That cannot be denied. As Edgar Joseph Jr FCJ said in *Pekan Nenas*:

> We need hardly add that the rule in *Turquand*'s case is designed to protect not the company itself, but persons dealing with the company. It follows that there is no reason why persons, including outsiders, who enter into transactions with a company, and who are sued should not invoke the benefit of the rule, as a defence (see *Howbeach Coal Co Ltd v Teague* (1860) 5 H & N 151; 157 ER 1136; *Garden Gully United Quartz Mining v McLister* (1875) 1 App at 39).

I am bound by the decision in *Pekan Nenas* and I am of the view that the principles distilled from that case will withstand the test of time for a long time to come.

It seems to me that the legal basis of the rule in *Turquand*'s case is that a person dealing with a company has no right at all to insist on proof by its directors that the provisions of its memorandum or articles have been complied with, and he cannot therefore be deemed to have constructive notice of some failure to comply which he has no means of discovering (*County of Gloucester Bank v Rudry Merthyr Steam and House Coal Colliery Co* [1895] 1 Ch 629 at p 636). It is plain common sense that a person dealing with a company will not be able to rely on the rule, and the company may refuse to be bound by the transaction, if the person knows that there has been some failure to comply (*Howard v Patent Ivory Manufacturing Co* (1888) 38 Ch D 156), or if the person knows facts which would lead a reasonable man to enquire further and so discover the failure to comply (*Kanssen v Rialto (West End) Ltd & Ors* [1944] Ch 346; [1944] 1 All ER 751, affirmed sub nom *Morris v Kanssen & Ors* [1946] AC 459; [1946] 1 All ER 586 and the need to contra with *Channel Collieries Trust Ltd v Dover, St Margaret's* and *Martin Mill Light Rly Co* [1914] 2 Ch 506), or if the person could or should, in the circumstances, have discovered the defect by inspecting documents filed with the Registrar of Companies which are open to members of the public for public inspection.

It is a correct statement of the law to say that the rule in *Turquand*'s case is especially designed to protect third persons dealing with the company from outside, which is conveniently referred to as outsiders, from defects and irregularities in the internal management of the company's affairs. As a corollary, it follows that persons who are inside the company and act as insiders cannot rely on the rule. The question to pose, indeed a pertinent one, would be: Who are the insiders? It is not a simple question to answer. It has been held that a member of a company is not outside the protection of the rule simply because he is a member (*Bargate v Shortridge* (1855) 5 HL Cas 297; *Re British Provident, Life & Assurance Society, Grady*'s *Case* (1863) 1 De GJ & Sm 488). *Morris v Kanssen* lays down the proposition that directors and persons who assume the functions of directors even though not properly appointed as such, are insiders if they act as directors representing the company in connection with the transaction in question and thus they are unable to rely on the rule in *Turquand*'s case for their own benefit.

Be that as it may, it was argued by the defendants that the plaintiffs cannot rely on the 'indoor management' rule for the following reasons:

(a) that the question foremost in the present case was not in relation to the 'internal' procedure or regulation but rather in regard to the authority conferred by the defendants' articles of association, a public document;

(b) that the defendants articles of association do not bind nor authorize the company secretary to bind the company either individually or jointly as a director;

(c) since the company secretary was not authorized to execute the sale and purchase agreement, it was argued that the plaintiffs should have been put on inquiry as to whether the signatories to the sale and purchase agreement were, in fact, properly authorized and that the failure to do so would preclude the plaintiffs from relying on the indoor management rule;

(d) Thong Kong Fye who signed the sale and purchase agreement for the vendors as a director was said to have no authority to do so; and

(e) there were common directors of both the plaintiffs and the defendants and it was argued that the lack of authority of the signatories to the sale and purchase agreement was a fact which should have been known to the plaintiffs.

Now, a perusal of the sale and purchase agreement, dated 28 July 1967 at exh P1 of bundle 'A' at p 161 thereof, showed that the signatories for the defendants as vendors were Thong Kong Fye and Koh Kok Peng. The former, a director/managing director, while the latter a secretary of the defendants. Article 64 of the defendants' articles of association listed the names of the directors of the defendants as Thong Kong Fye, Kwek Kok Thye, Kang Koh Ee and Koh Lam Yong. As a director of the defendants, Thong Kong Fye was empowered by art 70 of the defendants' articles of association to 'exercise all such powers of the company (referring to the defendants) and do on behalf of the company all such acts as may be exercised and done by the company (again referring to the defendants). As a director of the defendants, Thong Kong Fye was authorized by art 70 of the defendants' articles of association to manage the business of the company in such manner as he thinks fit. In fact, art 70 of the defendants' articles of association gave a blanket power to Thong Kong Fye and the other directors to manage the business of the company in such manner as they think fit. By art 78 of the defendants' articles of association, all acts done bona fide by the directors or by a committee of directors, or by any person as a director shall be valid. Thus, by signing as a signatory to the sale and purchase agreement in exh P1, what Thong Kong Fye did was entirely done above board and was valid. In affixing the seal of the company (referring to the defendants), it must be done in the presence of at least one director and the secretary, and the said director and secretary shall sign every instrument to which the seal shall be so affixed in their presence, and in favour of any purchaser or person bona fide dealing with the company (referring to the defendants), such signatures shall be conclusive of the fact that the seal has been properly affixed (see art 80 of the defendants' articles of association). The seal of the defendants was affixed to the sale and

purchase agreement as reflected in exh P1 and in my judgment, both Thong Kong Fye and Koh Kok Peng had rightly put their signatures thereto which must in law bind the defendants and be conclusive of the fact that the seal was properly affixed. This was my judgment and I so hold accordingly.

To go to the extreme, even if the appointment of Thong Kong Fye, as a director of the defendants, was defective, the validity of the sale and purchase agreement, dated 28 July 1967, cannot be put into question. Article 78 of the defendants' articles of association in clear language covers a situation of this kind and it says:

> All acts done bona fide by the directors or by a committee of directors, or by any person acting as a director, shall, notwithstanding it be afterwards discovered that there was some defect in the appointment of any such director, or person, acting as aforesaid, or that they or any of them were disqualified, be as valid as if every person had been duly appointed and was qualified to be a director.

A defective appointment of a director was demonstrated in the case of *Mahony (Public Officer of National Bank of Ireland) v East Holyford Mining Co Ltd.* There, a company was formed by one Wadge, to purchase a mine belonging to him at a price much in excess of its real value. The memorandum and articles were subscribed by two persons, Hoare and Wall (there was evidence that these two subsequently joined Wadge in directing the company's affairs), four clerks employed by Wadge at the address which become the company's registered office, and an independent person by the name of McNally. The articles provided that the subscribers of the memorandum should appoint the first directors of the company, but, in fact, none were ever appointed. Instead, Wadge, Hoare and Wall managed the company's affairs from its registered office, and issued a prospectus inviting the public to subscribe for the company's shares, in consequence of which they received money from applicants for shares. They paid this money into an account in the company's name at the appellant bank, and to enable them to draw on the account, Wall, purporting to act as the company's secretary although never appointed to that post, wrote to the bank requesting it to honour cheques signed on the company's behalf by any two of its three directors — Wadge, Hoare and McNally, in accordance with a resolution passed at a meeting of the directors. Naturally, the bank acted on this authority and allowed Wadge, Hoare and Wall to draw on the company's bank account. When the company was subsequently wound up, the liquidator sued the bank for the amount that had been paid out. The liquidator's claim was that since Wadge, Hoare and McNally had never been appointed as directors of the company, they had no authority to draw on its bank account, and the bank had consequently dissipated the company's money without its authority.

The House of Lords were quite blunt. They held that the bank was not liable. If the bank had inspected the articles of the company, it would have seen that the subscribers were entitled to appoint the first directors, and if the bank had visited the company's office, it would have found two of the subscribers, Hoare and Wall, and another person, Wadge, managing the

company's affairs with the apparent consent of four of the other subscribers, from which the bank could reasonably have deduced that Wadge and Hoare had been appointed to be directors of the company, and that Wall had been appointed to be its secretary. The House of Lords held that the bank had no right to insist on proof that these conclusions were correct, but since they appeared to be, the rule in *Turquand*'s case protected the bank, and it was entitled to treat Wadge, Hoare and Wall as though they had been lawfully appointed to the offices they pretended to hold.

Two points arising from the case of *Mahony (Public Officer of National Bank of Ireland) v East Holyford Mining Co Ltd*, must be brought to the fore. One point would be this. From the facts in *Mahony*, although the arrangements made by Wadge, Hoare and Wall made it appear that they had been appointed to be officers of the company, the bank never, at any time, inquired whether they had in fact been appointed and it did not rely on the appearance that they had; the bank simply accepted Wall's letter and acted on it. In my considered view, this clearly shows that the rule in *Turquand*'s case does not depend on estoppel, as do the rules relating to the apparent authority of a company's agents to act in its name. The second point would be this, and it is better to frame a question in this manner: Whether a person dealing with a company may assume that persons who pretend to act as its directors have been properly appointed in the absence of any evidence to that effect? It appears that an assumption to this effect can be made. Thus, for instance, in the case of *Duck v Tower Galvanizing Co Ltd* [1901] 2 KB 314, the proprietor of a business formed a company to carry it on, and he and his wife acted as directors of the company without being appointed to be directors by the subscribers of the memorandum, as the articles required, and without those subscribers, in any way acquiescing in them so acting, or in any way making it appear that they had been properly appointed. The 'directors' then proceeded to issue a debenture in the company's name to secure a loan made to the company. It was held that the debenture holder was entitled to assume that the 'directors' had been properly appointed from the mere fact that they were in control of the company's business and consequently, the court there rightly held that the company was bound by the debenture. Another instance would be the case of *Re County Life Assurance Co* (1870) 5 Ch App 288, where the sole continuing director of an insurance company purported to appoint new directors to fill vacant places on the company's board of directors, although the articles gave him no power to do so, and the 'directors' issued a policy in the company's name to the claimant. There was no evidence that the new directors had been properly appointed by the persons entitled to make the appointment (namely, shareholders in the general meeting), and the appearance that they had been done arose principally from the fact that they and the director who purported to appoint them were in control of the company's business. The court there held that the company was liable on the policy issued in its name because it was issued by persons who were acting as though they had been appointed as directors of the company.

The functions of the secretary are purely administrative and not managerial. The secretary should not assume any executive or managerial

powers in the absence of express authority from the board of directors. Article 49 of the defendants' articles of association speaks of the duty of the secretary in regard to the giving of notice to the members pertaining to the resolution that will be proposed under art 48 thereof. Article 72 of the defendants' articles of association speaks of the power of the directors by resolution to appoint a substitute for the secretary. And as I said somewhere in this judgment, by art 80 of the defendants' articles of association, the secretary is authorized to sign every instrument to which the seal shall be so affixed — of which it must be accompanied by at least one director. Without express authority, the secretary cannot assume a power which is vested in the directors. In *Barnet, Hoares & Co v The South London Tramways Co* (1887) 18 QBD 815 at p 817, Lord Esher MR succinctly said:

> The question in this case is whether, upon the mere fact that the person making these representations was the secretary of the company, and in the absence of evidence of any express authority or of any course of business from which authority might be inferred, we ought to hold that the secretary was a person upon whose statements the plaintiffs were entitled to rely as having authority thereby to bind the defendants ... A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all.

I adopt respectfully the above passages to be the law and from it two salient features emerge:

(1) in the event the secretary is shown to have express authority to perform certain acts, such acts will bind the company; and

(2) in the event it can be shown that the secretary had implied authority, as, for instance, by a course of dealing, the same result follows.

It is obvious that these two salient features came about by the application of that well known principle to the effect that a 'principal is answerable for the act of his agent in the course of his master's business' (per Earl of Halsbury in *Lloyd (Pauper) v Grace, Smith & Co* [1912] AC 716 at p 726).

The Federal Court treatment of the rule in *Turquand*'s case in *Pekan Nenas* was far from assisting the defendants, in fact assisted the plaintiffs. The relevant passages in the *Pekan Nenas*'s case that would be of assistance to the plaintiffs would be the following passages, and these passages, when applied to the plaintiffs, gave them the mileage and the upper hand and put them way above the defendants (at p 507):

(a) With profound respect to the Court of Appeal, at the time of the execution of the sale and purchase agreement, dated 3 December 1990, unless there was proof that the intervener/purchaser knew or ought to have known of the irregularities with regard to the meeting of 17 April 1990, referred to in the above passage of the judgment of the Court of Appeal, it is difficult to see how the contention advanced on behalf of the intervener/purchaser that it is entitled to rely on the rule in *Turquand*'s case, could have been rebutted.

(b) With respect, these considerations are irrelevant, where, as here, outsiders who believe they have entered into transactions with the company are not aware if a board meeting is irregular because proper

notice of it was not given in advance to each director, since they would not be affected by an irregularity if they have no knowledge of it (*Browne v La Trinandad* (1887) 37 Ch D 1). To put it in another way, such an outsider may rely on the rule in *Turquand*'s case which, when it applies, gives rise to an irrebutable presumption, so that the company concerned is debarred from establishing or relying on the fact that the proceedings were irregular and unauthorized.

By analogy, applying the above passages, the defendants here were debarred from challenging the validity of the sale and purchase agreements dated 28 July 1967. The defendants too were estopped from alleging that that sale and purchase agreement was not valid nor binding.

The argument that the resignations of the two directors, namely, Kwek Kok Thye and Kang Koh Ee on 27 July 1967, as adverted to in the early part of this judgment — which was a day prior to the date of the sale and purchase agreement, rendered the defendants' company with only one director, was to say the least totally misconceived. Applying the rule in *Turquand*'s case, the plaintiffs should not be burdened with finding out on the day of the execution of the sale and purchase agreement if any of the defendants' directors had resigned the day before. Incidentally, as stated somewhere in this judgment, Form 31 was dated 21 August 1967, and if calculated from 28 July 1967, it meant that there was a span of exactly 24 days. Now, even if the plaintiffs had an onerous duty to discharge by making a search with the registry of companies, the fact of the resignations of the two directors would not be known as that fact was only made public 24 days after the execution of the sale and purchase agreement by the lodgement of Form 31. A new complexion to the case was added when the plaintiffs introduced a document through Mr Ng Ek Teng (SP2). That document was the copy of the original letter of resignation of Kwek Kok Thye, dated 10 August 1967, which was marked as exh P24 as reflected at bundle C of p 181. It must be emphasized that there was no challenge as to the authenticity of exh P24. Evidence was adduced that exh P24 was kept and found from the author's personal records by Mr Ng Ek Teng (SP2). Exhibit P24 showed that Kwek Kok Thye resigned on 10 August 1967, which date coincided with the appointment of two new directors on 10 August 1967, in the persons of Seow Sik Kee and Chng Lai Seng as reflected in Form 31. Thus, when Form 31 recorded the date of the resignation of Kwek Kok Thye as 27 July 1967, it was not a true reflection of the fact as exh P24 showed that Kwek Kok Thye resigned on 10 August 1967. Exhibit P24 was worded thus:

> 10 August 1967
> Mr Thong Kong Fye, Messrs Lam Kong Co Ltd,
> 113 Amoy Street,
> Singapore.
>
> Dear Sir,
>
> As mutually agreed, I hereby tender my resignation as a member of the board for Lam Kong Co Ltd, effective today.

Yours faithfully,
Sgd (Illegible)
Kwek Kok Thye
cc: Koh Kok Peng,
c/o: Yew Seng Lam & Co

In my judgment, it was immaterial whether Kwek Kok Thye resigned on 27 July 1967 or 10 August 1967, because when the sale and purchase agreement was executed on 28 July 1967, Thong Kong Fye was still the director of the defendants and by virtue of art 78 of the defendants' articles of association, he was a 'person acting as a director' and was thus authorized to execute that sale and purchase agreement on behalf of the defendants.

Estoppel against the defendants

To add leverage to the case for the plaintiffs, original letters couched in damning words between the plaintiffs and the defendants proved beyond any doubt in a reasonable man's mind that not only was the sale and purchase agreement entered into by the parties, but the consideration adverted to in the early part of this judgment actually passed from the plaintiffs to the defendants. The original letters too showed that when the new management took over the affairs of the defendants, they had full knowledge of the sale and purchase agreement, dated 28 July 1967, and all along, repeatedly and in no uncertain terms, assured the plaintiffs that the defendants would observe and comply with the terms and conditions of that sale and purchase agreement. The correspondences were marked as exhibits in the course of the trial and for convenience, they must be itemized as follows:

(a) Letter dated 7 December 1967 from the plaintiffs to the defendants marked as exh P7 as seen at p 164 of bundle 'A'.

(b) Letter dated 21 December 1967 from the plaintiffs to the defendants marked as exh P8 as seen at p 165 of bundle 'A'.

(c) Letter dated 28 December 1967 from the defendants to the plaintiffs marked as exh P9 as seen at p 166 of bundle 'A'.

(d) Letter dated 11 January 1968 from the plaintiffs to the defendants marked as exh P6 as seen at p 167 of bundle 'A'.

(e) Letter dated 16 January 1968 from the defendants to the plaintiffs marked as exh P10 as seen at p 168 of bundle 'A'.

(f) Letter dated 5 April 1968 from the plaintiffs to the defendants marked as exh P11 as seen at p 169 of bundle 'A'.

(g) Letter dated 8 June 1968 from the plaintiffs to the defendants marked as exh P12 as seen at p 170 of bundle 'A'.

(h) Letter dated 15 June 1968 from the defendants to the plaintiffs marked as exh P13 as seen at p 171 of bundle 'A'.

(i) Letter dated 4 July 1968 from the plaintiffs to the defendants marked as exh P12 as seen at p 172 of bundle 'A'.

(j) Letter dated 5 March 1970 from the plaintiffs to the defendants marked as exh P15 as seen at p 174 of bundle 'A'.

(k) Letter dated 12 March 1970 from the defendants to the plaintiffs marked as exh P16 as seen at p 175 of bundle 'A'.

(l) Letter dated 16 March 1970 from the plaintiffs to the defendants marked as exh P17 as seen at p 173 of bundle 'A'.

(m) Letter dated 2 April 1970 from the defendants to the plaintiffs marked as exh P18 as seen at p 176 of bundle 'A'.

From the facts adduced, it was obvious that the plaintiffs obligation to construct the buildings hinged on the defendants furnishing the plaintiffs the necessary plans that were approved by the Collector of Land Revenue. Those plans were supposed to be submitted by the defendants' architect by the name of Mr Pastana. The plaintiffs were under an obligation to construct the buildings in accordance with the approved plans and not according to their whims and fancies. This condition precedent was duly acknowledged by the defendants as the plaintiffs drew the defendants' attention to the express provisions of cl 10(b) of the sale and purchase agreement dated 28 July 1967. The defendants were unabashed. They repeatedly acknowledged and admitted and apologized for the delay in furnishing the plans. This would bring into the picture the doctrine of estoppel. The defendants must surely be estopped from relying on their own failure, omission or breach which prevented the plaintiffs from erecting the buildings. The defendants too must be estopped from alleging that there was non-compliance by the plaintiffs.

In my judgment, these letters, especially the original letters of the defendants in the plaintiffs' possession, were clear evidence that the defendants defence of non-execution of the sale and purchase agreement, the failure of consideration etc, were nothing but mere shams. To quote an example reference to the letter dated 12 March 1970, marked as exh P16 of p 175 of bundle 'A', must be made and that letter was worded thus:

Lam Kong Company (Pte) Ltd
(Incorporated in Singapore)
571, Commonwealth Drive, Block 78,
Singapore 3,
Tel: 645172

Date: 12 March 1970

M/s Thong Guan Co Ltd,
5 Muturama Chitty Road,
Singapore

Dear Sirs,

Re: Lots 260 to 265, 269 to 283 & 296 to 300 Lam Kong Estate, Johor Bahru

We thank you for your letter dated 7 March 1970, together with enclosures. We are pleased to confirm that the company is now under the new management.

Pertaining to paragraph three of your letter, we are fully aware of the agreement of sale entered on 28 June 1967 (it should be 28 July 1967), between the company and your goodselves for the purchase of the 26 lots in Johor Bahru. In fact, the new management took over the company with the full knowledge that the 26 lots have been sold to you and the remaining lots are owned by the company.

As regards to the approved building plans, we regret to inform you that its validity has long been expired. However, we are applying to the authority concerned through our new architect to have the said plan renewed. As soon as the renewal is granted, we will forward to you a copy of the approved building plan.

Yours faithfully,
Lam Kong Co (Pte) Ltd

Sgd (Illegible)
Director.

The letter dated 12 March 1970, as reproduced above, created an estoppel against the defendants. It was a clear admission by the new management that they were fully aware of the sale and purchase agreement to purchase the 26 lots. The pertinent words employed in the letter dated 12 March 1970 were:

> In fact, the new management took over the company with the full knowledge that the 26 lots have been sold to you and the remaining lots are owned by the company.

That the date of the sale and purchase agreement was 28 July 1967, and not 28 June 1967, can readily be confirmed by referring, firstly, to the sale and purchase agreement itself (exh P1 of bundle 'A') and, secondly, to the letter from Messrs Boswell, Hsieh & Lim, dated 29 August 1967, which was marked as exh P2 as seen at p 163 of bundle 'A', and that letter was worded thus:

Boswell, Hsieh & Lim
Advocates & Solicitors Notary Public

29 August 1967

M/s Thong Guan Co Ltd,
5 Muturaman Chitty Road,
Singapore

Dear Sirs,

Re: Vacant lands on private Lots 260 to 265, 269 (265) to 283 and 296 to 300 Lam Kong Estate Johor Bahru

With reference to the above, we send you herewith, the original agreement for sale dated 28 July 1967, duly stamped for your retention. Please acknowledge receipt.

Yours faithfully,
Sgd (Illegible).

A Another letter dated 2 April 1970 from the defendants which was marked as P18 is now reproduced, shorn of its salutations:

> Re Lots 260 to 265, 265 to 283
> & 296 to 300 Lam Kong Estate,
> Johor Bahru
>
> B We refer to your letter dated 16 March 1970.
>
> We regret to inform you that the mortgage of your abovementioned properties to Asia Commercial Banking Corp Ltd was made by the former director of the company, Mr Thong Kong Fye. Since the company has been taken over by the new management, we will no doubt be liable for such act undertaken by Mr Thong Kong Fye.
>
> C
>
> Therefore, we will take steps to redeem your abovementioned properties and thereafter to comply with cl 6 of the said agreement for sale. We anticipate that the redemption may take quite some time and hope that you will give us ample (time) to resolve the matter.
>
> Your co-operation will be much appreciated.
>
> D
>
> Yours faithfully,
> Lam Kong Co (Pte) Ltd
>
> Sgd (Illegible)
> Director.

E and it clearly showed the undertaking by the new management to be liable for the act undertaken by Thong Kong Fye.

In the course of the trial, the defendants, through their counsel, raised concerted objections as to the admissibility of almost every document ranging from the sale and purchase agreement to the correspondences F adverted to earlier. Long and arduous arguments as to the admissibility of exhs P1, P2 and P3 were made and the parties mutually agreed that the ruling on the objections be withheld temporarily (see pp 59 and 60 of the notes of evidence). Later, the parties mutually agreed to come to a truce and the objections were withdrawn forthwith (see p 73 of the notes of evidence). The objections to the production of the original letters written by the G defendants were also advanced by the defendants on the grounds that the defendants' records were destroyed in a fire and, consequently, the defendants were unable to verify the documents. Surely, the plaintiffs ought not to be penalized for the destruction of the defendants records? The correspondences showed that the defendants have affirmed the existence of the sale and purchase agreement, yet they saw it fit to object for the sake of H objecting and objections were raised when Mr Hsieh testified that it was within his knowledge that the signatories to the sale and purchase agreement has since passed away. In the face of these objections, the plaintiffs were compelled to produce certified true copies of three out of the four signatories, one of which was from Australia.

I There was evidence that the plaintiffs paid all the outgoings on the 26 lots until the then Supreme Court set aside the default judgment. Thereafter, the defendants resumed payment of the outgoings. The

memorial of land register recognized the defendants as the owners until this court ruled in favour of the plaintiffs. The only way for the plaintiffs to protect their interest was by filing a caveat. The defendants had the audacity, notwithstanding the fact that they knew of the plaintiffs' claim, to enter into several sale and purchase agreements to sell the land under dispute. Such conduct would certainly disentitle them from any sympathy from this court.

In my judgment, the doctrine of estoppel would operate against the defendants. In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 345, Gopal Sri Ram JCA speaking for the Federal Court had this to say of the doctrine:

> We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russell of Killowen in *Dawsons Bank v Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p 108:
>
> > 'Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.'

Further down the same judgment, his Lordship Gopal Sri Ram JCA cited with approval the speech of Lord Denning in the *Amalgamated Investment*'s case [1982] 1 QB 84 at p 122; [1981] 3 All ER 577 at p 584; [1981] 3 WLR 565 at p 575, where Lord Denning in his usual style observed:

> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time, it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

Applying the speeches of Gopal Sri Ram JCA in *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Ltd*, and Lord Denning in the *Amalgamated Investment*'s case vigorously to the factual matrix of the present case must surely mean that the defendants were estopped from denying the correspondences adverted to in this judgment, which showed beyond doubt, that the defendants were liable under the sale and purchase agreement.

In *Crabb v Arun District Council* [1976] Ch 179, Lord Denning MR had this to say of proprietary estoppel:

> When counsel for the plaintiff, said that he put his case on an estoppel, it shook me a little: because it is commonly supposed that estoppel is not itself a cause of action. But that is because there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action. We had occasion to consider it a month ago in *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225, where I said at p 242, that the effect of estoppel on the true owner may be that:
>
> > '... his own title to the property, be it land or goods, has been held to be limited or extinguished, and new rights and interests have been created therein. And this operates by reason of his conduct — what he has led the others to believe — even though he never intended it.'
>
> The new rights and interests, so created by estoppel, in or over land, will be protected by the courts and in this way give rise to a cause of action ... .
>
> The basis of this proprietary estoppel — as indeed of promissory estoppel — is the inter position of equity. Equity comes in, true to form, to mitigate the rigours of strict law.

The defendants here held out, so to speak, that Thong Kong Fye and Koh Kok Peng were invested with the powers to execute the sale and purchase agreement dated 28 July 1967, and consequently, the defendants were estopped from denying that the powers were indeed invested in them.

Estoppel is a rule of evidence and the classic treatment on this subject can be seen in *Low v Bouverie* [1891] 3 Ch 82 at p 105, where Bowen LJ said:

> ... Estoppel is only a rule of evidence; you cannot found an action upon estoppel. Estoppel is only important as being one step in the progress towards relief on the hypothesis that the defendant is estopped from denying the truth of something which he has said.

Lord Wright in *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 at p 56, described estoppel in these words:

> Estoppel is often described as a rule of evidence as indeed it may be so described. But the whole concept is more accurately viewed as a substantive rule of law.

Lord Diplock in *Mills v Cooper* [1967] 2 QB 459 at p 469 observed:

> Whatever may be said of other rules of law to which the label of 'estoppel' is attached, 'issue estoppel' is not a rule of evidence. True, subject to the qualification I have stated, it has the effect of preventing the party 'estopped' from calling evidence to show that the assertion which is the subject of the 'issue estoppel' is incorrect, but that is because the existence of the 'issue estoppel' results in there being no issue in the subsequent civil proceedings to which such evidence would be relevant. Issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation.

Bayley J said in *Baker v Dewey* (1823) 1 B & C 704 at p 707 that: A

> A party who executes a deed is estopped in a court of law from saying that the facts stated in the deed are not truly stated.

Thus, if a deed contained a receipt for the purchase of property, the defendant was estopped in a common law action on the deed, from alleging that part of the money had not been paid, provided the estoppel was duly pleaded (*Potts v Nixon* (1870) IR 5 CL 45). B

Now, in the present case before me, the plaintiffs pleaded estoppel in the amended statement of claim in para 7 thereof, and proceeded one step ahead by particularizing them (see p 7 of bundle 'D').

Another example of an estoppel by deed would be the case of *Bowman v Taylor* (1834) 4 LJKB 58, where the principle was applied to recitals in a deed so that the defendant, a licensee of patent rights, was estopped from denying that the plaintiff was the inventor as he had executed a deed of licence which recited that this was the case. A word of warning should be sounded here. The doctrine of estoppel by deed is extremely limited and circumscribed. Firstly, it applies between parties to the deed and those claiming through them. Secondly, it applies only on actions on the deed. Thirdly, the doctrine applies only to clear and unambiguous statements (*District Bank Ltd v Webb* [1958] 1 All ER 126; [1958] 1 WLR 148). Finally, it does not prevent a party from setting up a plea of illegality or fraud or from availing himself of any fact which would have given rise to a right to rescind the deed in equity. C D E

Suffian FJ (as he then was), in explicit terms stated that 'the law of estoppel is found in s 115 of the Evidence Act.' That section enacts as follows:

> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, otherwise than but for that belief he would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing. F

So much for the law on estoppel. G

The plaintiffs were required under cl 4 of the sale and purchase agreement to build the houses to enable the defendants to apply to the appropriate authorities for the issuance of the individual documents of title to the 26 lots. The construction of the buildings on the 26 lots do not confer any benefit on the defendants but it was a pre-requisite by the appropriate authorities for the issuance of the individual titles to the 26 lots. Of pertinence would be the issuance of the individual titles in favour of the defendants in regard to the 26 lots by the Collector of Land Revenue on 29 May 1968, notwithstanding the fact that no buildings had been constructed on those lots. This state of affairs can be discerned on perusal of the titles to the 26 lots as reflected at pp 59–82 of bundle 'A'. It is apparent that the defendants were merely pulling wool over the plaintiffs' eyes when they were stringing the plaintiffs all along about their inability to H I

A furnish the approved building plans on account of their not having paid their architect's fees. The construction of the buildings on the 26 lots was but a non-issue. As stated, the defendants had already secured the titles to the 26 lots and they deliberately withheld this information and had breached their obligations under cl 6 of the sale and purchase agreement when they failed to transfer the titles thereto in favour of the plaintiffs. It was
B a plain case of cheating and nothing else.

Fraud

The defendants pleaded fraud at para 2.3 of their re-amended statement of
C defence at p 13 of bundle 'D' thereof. The particulars of fraud were particularized. But unfortunately, the plea of fraud was wholly unsupported by the available evidence. Ironically, the plea of fraud emanated from the defendants when it should have been the plaintiffs who should take advantage of it.

D *Time bar*

No doubt the issue of time bar was pleaded but the defendants have neither canvassed this issue in the course of the trial nor in their submissions. It was a wise move by the defendants. In the result, this issue must have been abandoned by the defendants.

E

The evidence for the defence

Hii Yii Pan (SD1) testified for the defendants. It was his testimony that he became a director sometime in 1978 and conveniently resigned in 1991. At the material time in question — 28 July 1967, he was not a
F director of the defendants. To say the least, his evidence was uneventful and of no use at all. He merely testified that while he was a director of the defendants, the latter were not in possession of the relevant documents as seen at p 190 of the notes of evidence. This must be so as the fire broke out in 1972.

G He had the audacity to say that he was only aware of the defendants' assets but not its liabilities. He was unable to give any credible and cogent explanation as to why his group paid S$160,000 for the purchase of the entire shareholding of the defendants without a single legal document for that transaction. To confound the matter further, he did not even bother to conduct a land search (see p 215 of the notes of evidence). It was Hii Yii
H Pan's testimony that when his group was faced with this suit in 1983 (see pp 213 and 214 of the notes of evidence), he and his group were unsuccessful in contacting the previous shareholders and directors. He confirmed in categorical terms that he knew nothing of the circumstances that led to the signing of the sale and purchase agreement. He had the audacity to say that he had entered into sales of properties and shares in
I other companies with the same modus operandi. Hii Yii Pan's testimony was not worth 'powder and shot' — it was a testimony that would not be beneficial to the defendants at all. It must be borne in mind that this was the

testimony of the defendants who had alleged fraud against the plaintiffs. Where, must I ask, was there an element of fraud that can be distilled from the evidence of Hii Yii Pan?

For the reasons adumbrated above, judgment should be in favour of the plaintiffs. The reliefs and prayers sought for by the plaintiffs in the amended statement of claim were allowed with costs. Damages as itemized in para (vi) of the amended statement of claim to be assessed by the senior assistant registrar forthwith.

Judgment for the plaintiffs.

Reported by Ng Sheau Jiuan